United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-6071

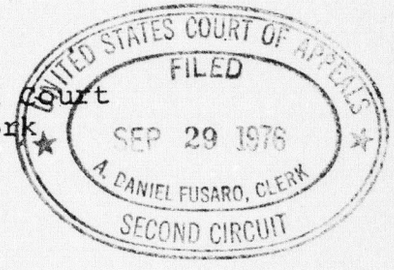
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. J. USERY, JR., SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

COLUMBIA UNIVERSITY, A Corporation, and WILLIAM J. McGILL, Individually and as President of COLUMBIA UNIVERSITY, APPELLEES

Appeal from the United States District Court
for the Southern District of New York



BRIEF FOR THE SECRETARY OF LABOR

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PRELIMINARY STATEMENT

This appeal is from the judgment entered by Judge Richard Owen (Southern District of New York) on March 2, 1976. The court's opinion is reported at 407 F.Supp. 1370 and is reproduced in the printed Appendix at p. 15.

STATEMENT OF THE CASE

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act[1/] to enjoin defendants (hereinafter "Columbia University") from maintaining

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1/ Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended; 29 U.S.C. 201 et seq.

a wage differential between its maids (restyled "light cleaners" in 1972) and janitors (restyled "heavy cleaners" in 1972) for work which is "equal" within the meaning of the statutory equal pay requirement. The Secretary alleged that the wage differential (currently 45 cents an hour) discriminated against maids on the basis of sex in violation of the Act's equal pay provisions, known as the Equal Pay Act of 1963 (29 U.S.C. 206(d)(1)), and sought to restrain Columbia from further violations of the Act and from withholding back wages due to the women as a result of past violations.

Columbia admitted that it was subject to the Act's requirements (Pltf's Exh. 119, p. 2).[2/] It denied any violations, however, claiming that the work of the maids and janitors was not equal. The Secretary's action was consolidated for purposes of trial with a separate Title VII[3/] suit instituted earlier by individual women employees of Columbia who alleged discrimination in hiring, job placement, pay, promotions and training. Cora P. Walker, et al. v. Columbia University, et al., No. 73 Civ. 2687. Following a trial, the district court dismissed both actions,

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2/ "A." references are to the printed Appendix. The Secretary's exhibits are designated "Pltf's Exh. _."

3/ Title VII of the Civil Rights Act of 1964, as amended; 42 U.S.C. 2000e et seq.

concluding, as to the equal pay claims, that "[w]hile there are many similarities between the work done by the light cleaners and heavy cleaners, their work is not the same" (Opin., p. 10). The Secretary's notice of appeal was filed on April 28, 1976. 4/

STATUTORY PROVISIONS INVOLVED

Section 6(d)(1) of the Fair Labor Standards Act, as amended by Section 3 of the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d)(1), provides:

> No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

4/ A notice of appeal was also filed in the Walker case, but it was subsequently withdrawn on May 25, 1976. Because the Secretary of Labor has no authority under Title VII of the Civil Rights Act, we do not address any of the separate discrimination claims raised by the Walker plaintiffs.

Other pertinent provisions of the Equal Pay Act of 1963 include the Congressional findings contained in Section 2(a) of the Act and that part of Section 3 which amended the Fair Labor Standards Act of 1938 by adding to it Section 6(d)(2).

Section 2(a) of the Equal Pay Act of 1963, 77 Stat. 56, provides:

> The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex -- (1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition.

Section 6(d)(2) of the Fair Labor Standards Act of 1938, as amended by Section 3 of the Equal Pay Act of 1963, 77 Stat. 57, 29 U.S.C. 206(d)(2), provides:

> No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

STATEMENT OF FACTS

Although this appeal challenges the trial court's conclusory findings and interpretations of the evidence, the material facts determinative of the basic issue of job equality are largely undisputed.

The employees involved in this action are the maids and janitors employed at Columbia's Morningside Heights campus (and environs) to provide custodial services in the academic buildings and residence halls (A. 529, 572, 750). These employees are assigned to all three shifts, although the majority of them work from 12 midnight to 8:30 a.m. (Pltf's Exh. 126). (A map of the Morningside Heights campus, Pltf's Exh. 101, is reproduced in the Appendix at p. 1542.) Historically, the maids, who have always been female, have been paid less than the janitors, who, with the exception of a "janitor (shower maid)" classification added by the 1949 Contract, which typically applied only to two and never to more than eight employees (Tr. 1937, A. 1226, 1230, 1231), [5]

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[5] This classification was limited to those maids who had as their exclusive cleaning assignment the restrooms and shower facilities in the female residence halls (A. 1140); currently, there are only two such maids (one full-time and the other part-time) who clean the restrooms in Johnson Hall (A. 1230, 1231). The first reference to the "shower maid" classification was in the 1949 Contract, under the "wage and hour schedule [for] part-time employees" (Pltf's Exh. 112, p. 28). It appears thereafter only in the 1950 and 1957 Contracts, also under the part-time schedule (Pltf's Exhs. 108, 111). Very few of the maids who testified were aware of this classification and only one knew that it carried a higher rate (A. 300, 307, 562, 641-643, Tr. 1044-1045, A. 848, 1002, 1005).

have always been male, at least until August 1972.[6/] The wage differential was initially established by Columbia (A. 1252-1253) and was already in existence when the employees were organized in 1945 by the Transport Workers Union, Local 241 (hereinafter the "Union" or "TWU"). The differential is currently 45 cents an hour -- and has been for the entire period covered by this action (Pltf's Exhs. 104, 129, A. 1543, 1544).

The number of maids employed has declined in recent years as Columbia has curtailed its maid services -- first, by eliminating room service in the residence halls (except when students check out or during summer vacation) and, secondly, by reducing the frequency of cleaning in the classrooms and offices (A. 86, 537, 1206, 1209). Prior to these changes, the maids performed a number of duties which they now perform only occasionally. One example is wet-mopping which they regularly did when cleaning student rooms, as well as laboratories, hallways and staircases in both the residence halls and academic buildings. Another is cleaning women's restrooms which they did in certain assigned areas. (A. 56, 410, 503-506, 541-543, 625-626, 658, 798, 843-844, 847-848, 856, 875-876, 992-993, 1001-1002, 1402.)

6/ Seven women were hired as janitors in August 1972, some eight months after several maids had filed discrimination complaints with the New York State Human Rights Division (A. 187-191). Four of these women returned to their former maid jobs; one has been promoted to a guard position; and the other two are still employed as janitors (Opin., pp. 13-14, A. 26-27). There have not been any maid applicants for janitor jobs since August 1972 (ibid.), when a proposed lay-off of 28 maids was withdrawn. It had been this proposal which first prompted the complaints to the Human Rights Division (A. 1192, 1201-1202, 1216).

At the time of trial, there were approximately 111 maids: 29 worked in the residence halls and 82 worked in the various academic buildings (Pltf's Exhs. 125, 126). The maids in this latter group were each given an assigned area of classrooms and offices, including small bathrooms, corridors, library stacks, lounges, machine rooms (print shops, dark rooms, typing rooms, microfilm rooms, etc.), laboratories, conference rooms, auditoriums, lecture halls, etc., which they were required to keep clean. This involved dust mopping or vacuuming the floors, which, in an auditorium or classroom, required moving the chairs or maneuvering in and around rows of seats or benches; using a brush or toy broom to clean corners and other hard-to-reach areas, and to sweep up paper clips and other items that the vacuum cleaner would not pick up; dusting (not only furniture, but baseboards, window sills, radiators, shelves, bookcases, etc.); polishing and cleaning furniture and other fixtures, such as drinking fountains and white formica table tops; cleaning woodwork and removing spots from walls and doors; removing floor stains with a wet rag or small mop; emptying waste baskets[7/] and ashtrays and picking up trash from lounge areas; cleaning ashtrays; scrubbing small bathrooms; and depositing filled bags of trash at the elevators for pick-up by a janitor.

7/ There are a few buildings where this task is performed by the janitors (A. 1267, 1273, 1280-1281, 1309-1310, 1480).

Typically, these maids carried their equipment and supplies on a wheeled cart which, when loaded with brooms, dustmops, a vacuum cleaner or carpet sweeper, a pail of soapy water, rags, soap, polish and a trash bag, could weigh up to 111 pounds (A. 52, 129, 500, 1428-1430). A few maids, who did not have to collect large quantities of trash, carried their equipment in their hands and in shopping bags (where they stored their rags and cleaners), and tied a plastic trash bag to their waists (A. 143-144, 148, 230).

There were also a few maids who at one time or another worked in small converted office buildings located immediately off campus (A. 41-46, 77-80, 82, 384-387, 1039). These buildings were three or four stories and the maids performed essentially the same duties there that they performed in the larger academic buildings (A. 41-46, 76-82), except that they were required to clean a number of bathrooms (A. 41-44, 79) and to carry trash out to the street (A. 46). The last maid assigned to this work, Mrs. Dickens, was transferred in January 1974 (A. 76), allegedly because of Columbia's concern for her safety (A. 1496-1497). Her work was reassigned to a male janitor (ibid.).

The other maids were assigned to the residence halls, and each one was responsible for cleaning the corridors, lounges and other common areas of one entire building (including lounges on each floor, offices, study

rooms, a conference room and the lobby). This involved vacuuming these areas on each floor (usually ten in all); dusting draperies, furniture, window sills, baseboards, files and radiators; damp cleaning desk tops, drawer fronts, chairs and telephones; and emptying the garbage (A. 529, 533-537, 548-549, 617-619, 624, 635). During the summer, these maids cleaned each of the vacated rooms, washed furniture and all woodwork, cleaned drawers and closets, took apart the box springs and cleaned each spring with a damp rag, and scrubbed the face bowls (A. 84, 533, 535, 544, 548, 622-624). The maids did not use carts but carried their equipment in their hands from floor to floor (A. 532, 538, 564-566, 648-649).

Nineteen maids testified at the trial. The two assigned to residence halls, Mrs. Thomas and Mrs. Tooks, were each responsible for maintaining a ten-story building (A. 533-537, 544, 548-549, 617-619, 622-624, 635; Dft's Exh. L; Pltf's Exh. 120). The other maids were assigned as follows: (1) Mrs. Dickens (A. 65, 69), assigned to Butler Library where she cleaned the seventh floor (60 library cubicles or small offices), the fifth floor (5 rooms, a classroom and a small bathroom), and the mezzanine (eight offices and a stairway); (2) Mrs. Walker (A. 126-127, 131, 137, 139, 141-143, 145), assigned to Journalism where she cleaned five offices plus the entire sixth floor of a half-block long building (a radio and television room, six small offices or cubicles, two classrooms, a dark room, a news room, and a reception area), and previously assigned to

Philosophy, where she cleaned the sixth and seventh floors (39 offices, six conference rooms and a lounge); (3) Mrs. Forbes (A. 174-176), assigned to Butler where she cleaned the library stacks, two small bathrooms and a few rooms; (4) Mrs. Moss (A. 229-232, 240), assigned to Philosophy where she cleaned the fifth floor (15 or 20 offices and two classrooms), fourth floor mezzanine (nine offices and a hallway), and one-half of the third floor (three classrooms), and previously assigned to Journalism, where she cleaned the third and fourth floors (library, student lounge, offices, extremely large conference room, printing lab and classrooms); (5) Mrs. Collier (A. 271, 276, 278, 279), assigned to Butler where she cleaned the sixth floor (a lounge, 20 offices, five reading rooms, a reception area and two corridors), and the stacks and bathrooms on the fourth and fifth floors; (6) Mrs. Ellis (A. 379-380, 383-384), assigned to the Law School where she cleaned the seventh and eighth floors (42 offices, a large typing room, library stacks, study areas and two classrooms), and previously assigned to the first floor where she cleaned seven lecture halls, three lunch halls, three small rooms, the information center, a student lounge and a locker room; (7) Mrs. Maghee (A. 410,412, 416-417, 423), assigned to Pupin where she cleaned part of the eighth floor (a tea room), the thirteenth floor (laboratories) and the twelfth floor (engineering labs and hallways);

(8) Mrs. Leonard (A. 499, 510), assigned to Mudd where she cleaned the second and twelfth floors (offices, laboratories, classrooms, and seminar rooms); (9) Mrs. Phillips (A. 579), assigned to Mathematics where she cleaned all of the second floor and part of the third and sixth floors (classrooms, offices, library stacks, and hallways); (10) Mrs. Rawls (A. 592, 594, 596, 598, 603-604), assigned to McVickar where she cleaned on an alternate basis half of the second floor (nine rooms), the fifth floor (a seminary room, offices and a lounge), third floor and fourth floor; (11) Mrs. Robinson (A. 660-661), assigned to SIA where she cleaned the entire second floor (a large lounge, reading rooms, six offices, the library, some cubicles); (12) Mrs. Kirkland (A. 681-683), assigned to SIA where she cleaned on an alternate basis the seventh floor (22 offices, 1 classroom and a large student lounge), eighth floor (30 offices), ninth floor (22-30 offices) and tenth floor (same); (13) Mrs. Ortiz (A. 793-795, 801), assigned to Mudd where she cleaned on an alternate basis the eighth and ninth floors (38 small rooms, 12 laboratories, nine large rooms and three classrooms); (14) Mrs. Stampp (A. 815-816), assigned to Havemeyer where she cleaned part of the third floor (a classroom and part of a large lecture room), the fifth floor (8 laboratories), and sixth floor (three offices and four laboratories); (15) Mrs. Seibert (A. 843-845, 846, 850, 1329, 1331), assigned to Chandler where she cleaned the second

floor (four offices), the third floor (three offices and a lounge), the fourth floor (the library), the fifth floor (three offices) and the sixth floor (three offices); (16) Mrs. Isabell (A. 996, 1011-1012, 1327), assigned to Chandler where she cleaned the seventh, eighth and ninth floors (54 labs and offices and 5000 square feet of corridors), and (17) Mrs. Williams (A. 1043-1047, 1049-1054, 1063), assigned to Fayerweather and Schermerhorn where she cleaned a large architectural drafting room, a paper or printing room, a classroom, 60 offices, additional offices and a small bathroom.

In addition to the maids, Columbia employed at the time of trial some 160 janitors (Pltf's Exhs. 102, 126). These janitors can be grouped into roughly four categories: restroom janitors; classroom/lobby/stairway wet-mop janitors; off-campus janitors; and special project janitors. Janitors in the first group were assigned specific restrooms which had to be cleaned on a daily basis.[8/] This involved dusting and wet mopping the floors, cleaning the toilets and sinks, emptying trash, and washing marks off the wall and towel racks. In the larger building, this cleaning work would be the janitor's primary assignment, although he might spend up

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8/ As indicated supra, the maids still cleaned the bathrooms located in the stacks at Butler Library and in certain office areas (A. 276, 600-601). Many of these facilities, moreover, were not any smaller than some of those cleaned by the janitors (A. 478, 741).

to 30 minutes a day pushing trash trucks from the building's basement to the street. Of the six witnesses who testified, three were restroom cleaners: Irenio Cordero, Augusto Peralta, and Jose Requeijo. Mr. Cordero spent all but 30 minutes a day cleaning 16 restrooms (each with one to four toilets). His only other function was pushing the trash trucks (A. 475-479). Mr. Peralta and Mr. Requeijo, who worked together, also spent the bulk of their time cleaning restrooms, except that one of them had to spend 15 to 30 minutes pushing the trash trucks (A. 741, 749, 883-885).

The janitors in the second group (classroom/lobby/stairway wet-mop) were assigned to the same general areas as the maids, except that they wet-mopped rather than dust-mopped floors (Sampson, A. 332, 336-338, 353, 387, 388, 1387-1389; Derac, A. 873, 876-878; Boubof, A. 745); others were assigned to lobbies, corridors, stairways and laboratories, where they spent essentially all of their time wet-mopping and, in some cases, cleaning blackboards (A. 1272, 1273, 1277-1278, 1279, 1281, 1289, 1312). Some of these janitors (viz., those in Journalism, Avery, Chandler and Havemeyer) also collected trash from the offices and classroom areas because it was generally bulkier than the trash collected by maids in the other buildings (A. 1267, 1273, 1280-1281, 1309-1310, 1480). Mr. Beaton, for example, testified that he spent 4 hours emptying wastebaskets on each floor of Havemeyer and transporting trash to the basement and out of

the building, an hour washing blackboards, one or two hours wet-mopping, and the remainder of his time sweeping stairwells with a broom (A. 751-753, 757, 764, 786). Another janitor, Mr. Sampson (A. 331-332, 336-338), spent his entire shift cleaning the offices in two small off-campus buildings (16 offices, three small bathrooms, two kitchenettes, two large rooms and a stairway), which duties took two hours, and part of the first floor at the Law School (seven lecture halls, a lounge and the locker room). Mr. Derac, who did not testify, apparently performed similar duties at Chandler (A. 872-873, Tr. 1537-1539).

The third group of janitors was assigned to work in the small converted office buildings located immediately off campus. As noted, supra, p. 8, this work was in the past also performed by maids. Indeed, one of the janitors, Alfredo Reyes, had simply replaced Mrs. Dickens and now performed the same work that she had (A. 1496-1497). Another janitor, Mr. Garcia, worked at two similar buildings for almost two years (A. 453-454). In cleaning these buildings, he emptied wastebaskets; carried the trash out to the street in a large plastic bag; swept; cleaned furniture; dust mopped; and vacuumed with a household vacuum cleaner (A. 454, 461, 464). He also wet-mopped the lobby and cleaned the small private bathrooms (A. 461, 473-474). Mr. Garcia had never in the course of his employment, pushed a trash cart, operated a floor machine, polished brass or marble, hosed sidewalks or shoveled snow (A. 455-456). Nor had he ever handled a

55-gallon drum of cleaning solution or washed blackboards (A. 460, 468, 470). See also the testimony of Mr. Peralta, who for three years performed similar duties at two small buildings on W. 116th Street (A. 703, 705-708).

The janitors in the fourth group were not assigned any regular cleaning areas (as were the other maids and janitors) but were assigned "special project work" such as scrubbing and stripping floors, shampooing rugs, washing venetian blinds, etc. This was work which did not have to be performed every day (A. 1267-1268) but which would have to be done sometime if the buildings were to be maintained properly. Each of the larger buildings had a number of janitors assigned to it who did mostly this kind of work (A. 1269, 1272, 1279-1280, 1284, 1289). One of their major duties was scrubbing and stripping floors, which they were paid extra for. Because these duties were not considered by the court in determining the basic issue of job equality, they will not be discussed here, although reference is made to them in the Argument, infra, pp. 31-33.

ARGUMENT

THE MAIDS AND JANITORS EMPLOYED BY COLUMBIA PERFORM EQUAL WORK WITHIN THE MEANING OF THE EQUAL PAY ACT. THE TRIAL COURT'S CONTRARY DETERMINATION IS PRECLUDED, UNDER APPLICABLE LEGAL PRINCIPLES, BY THE UNDISPUTED RECORD EVIDENCE.

"It is now well settled," as this Court stated in Hodgson v. Corning Glass Works, 474 F.2d 226 (1973), aff'd sub nom. Corning Glass Works v. Brennan, 417 U.S. 188, 203-204, n. 24, that jobs "need not be identical" before they can be compared for purposes of the Equal Pay Act.[9/] It is sufficient if (1) the job duties are "closely related"

9/ Some of the numerous decisions so holding, in addition to those cited in the text, supra, include Shultz v. Wheaton Glass Company, 421 F.2d 259, 266-267 (C.A. 3, 1970), cert. denied 398 U.S. 905 (selector-packers and selector-packer-stackers); Hodgson v. Daisy Manufacturing Company, 317 F.Supp. 538, 551-552 (W.D. Ark. 1970), aff'd per curiam 445 F.2d 823 (C.A. 8, 1971) ("heavy" and "light" press operators, "heavy" and "light" assemblers, "heavy" and "light" packers, "heavy" and "light" inspectors, and "heavy" and "light" paint line tenders); Brennan v. South Davis Community Hospital, 76 CCH Lab. Cas. ¶33,201, 22 WH Cases 177, 179 (D. Utah 1974), aff'd ___ F.2d ___ (C.A. 10, July 27, 1976) (maids and janitors; aides and orderlies); Hodgson v. San Diego Unified School District, 71 CCH Lab. Cas. ¶32,920, 21 WH Cases 123, 127 (S.D. Cal. 1973), aff'd per curiam in an unpublished memorandum (C.A. 9, September 5, 1974, No. 72-2805) (maids and janitors); Brennan v. Houston Endowment, Inc., 73 CCH Lab. Cas. ¶33,022, 21 WH Cases 561, 563 (S.D. Tex. 1974, not otherwise reported), aff'd per curiam 511 F.2d 1190 (C.A. 5, 1975), cert. denied 423 U.S. 893 (1975) (maids and janitors); Brennan v. Goose Creek Consolidated Ind. Sch. Dist., 71 CCH Lab. Cas. ¶32,904, 21 WH Cases 25, 27 (S.D. Tex. 1973), aff'd 519 F.2d 53 (C.A. 5, 1975) (custodians I and II); Brennan v. Board of Education, 374 F.Supp. 817, 828-829 (D. N.J. 1974) (maids and janitors);

(Fn. Cont'd. Next Page)

or "very much alike" (Hodgson v. Miller Brewing Co., 475 F.2d 221, 227 (C.A. 7, 1972); Hodgson v. City Stores, Inc., 479 F.2d 235, 238 (C.A. 5, 1973); 109 Cong. Rec. 9197),[10/] and (2) such duties require substantially equal skill, effort and responsibility and are performed under similar working conditions (Hodgson v. Corning Glass, supra, 474 F.2d at 234; Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1049 (C.A. 5, 1973); Hodgson v. Fairmont Supply Co., 454 F.2d 490, 493 (C.A. 4, 1972); Shultz v. American Can Company, 424 F.2d 356, 360 (C.A. 8, 1970)).

Here, there is no question that the primary duties of the maids and janitors are closely related, involving as

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9/ CONT'D. Brennan v. Prince William Hospital Corp., 503 F.2d 282, 285-286 (C.A. 4, 1974), cert. denied 420 U.S. 972 (1975) (aides and orderlies); Brennan v. Owensboro-Daviess Cty. Hosp., 523 F.2d 1013, 1028-1030 (C.A. 6, 1975), cert. denied 44 U.S.L.W. 3659 (May 19, 1976) (aides and orderlies). Hodgson v. Square D Company, 459 F.2d 805 (C.A. 6, 1972), cert. denied 409 U.S. 967 (1972), affirming the district court's holding of equal work at 64 CCH Lab. Cas. ¶32,397, 19 WH Cases 752, 753-754 (E.D. Ky. 1970, not otherwise reported) (machine operators A and B and assemblers A and B/C); Hodgson v. Allied Supermarkets, Inc., 68 CCH Lab. Cas. ¶32,683, 20 WH Cases 616, 620-621 (E.D. Okla. 1972), aff'd in an unpublished opinion (C.A. 10, March 26, 1973) (checkers and checker-stockers).

10/ The purpose of this first test is to exclude "dissimilar" jobs even though they may involve equal skill, effort and responsibility, such as, to use the example from the legislative history, "the clerk typist in the business office and the drill press operator in the shop" (1963 Hearings before the House Labor Subcommittee on H.R. 3861 and Related Bills, 88th Cong., 1st Sess., p. 240).

they do the performance of routine, unskilled cleaning tasks. Although the specific tasks and equipment used to perform these tasks will vary depending upon the areas to which the maids and janitors are assigned, these variations are not sufficient to destroy the basic identity of job function, which, in this case, is custodial work. The two jobs thus come within the general scope of the Act's equal pay provisions and the only question is whether the duties of the maids and janitors require substantially equal skill, effort and responsibility.

The opinion below refers only to the factor of effort. We can assume, however, based on the absence of any reference to skill or responsibility, and in view of the routine nature of custodial work, that the court found no distinction in the skill or responsibility requirements of the two jobs. See infra, pp. 23, n. 12; 33. In nonetheless concluding that maids and janitors performed unequal work (despite the "many similarities" in their jobs (Opin., A. 23)), the trial court "affirmatively" found that the duties of the janitors required heavier cleaning (Opin., A- 17-20) and "involve[d] greater effort" than the duties of the maids (Opin., A. 24). These findings, which are conclusory in nature, are not supported by any specific evidentiary findings or by the record evidence and are, we submit, based on

unwarranted inferences and a mistaken interpretation of the statutory standards and objectives of the Equal Pay Act.[11/]

At the outset, we would emphasize that the jobs of both the maids and janitors are indisputably physical in nature and involve a substantial amount of pushing, carrying, bending, stooping, lifting, stretching and walking. In concluding that the physical effort required of the janitors was "greater," the trial court did not specify what it was about their duties that made them more arduous. Apparently the court was influenced by the fact that the janitors are assigned to the more "public" areas -- viz., lobbies, stairways, elevators, corridors and restrooms (see Opin., A. 18) and use equipment which is heavier than most of the equipment used by the maids (Opin., A. 19-20). There is nothing in the record, however, to support the court's assumption that cleaning these "public" areas required more effort than cleaning a larger number of less trafficked areas such as offices, classrooms and libraries, or that the equipment needed for such cleaning, which was either used for infrequent periods or in combination with other janitors or

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11/ Conclusory "findings" are, of course, not subject to Rule 52(a), F.R.Civ.P. See, e.g., Baumgartner v. United States, 322 U.S. 665, 671 (1944); In re Hygrade Envelope Corp., 366 F.2d 584, 588 (C.A. 2, 1966); Shultz v. American Can, supra, 424 F.2d at 360; Hodgson v. Fairmont Supply, supra, 454 F.2d at 493; Shultz v. Wheaton Glass, supra, 421 F.2d at 267; Brennan v. J.M. Fields, Inc., 488 F.2d 443, 446 (C.A. 5, 1973), cert. denied 419 U.S. 881.

was on wheels and could be moved easily, required any greater effort.

Admittedly, the hallways and lobbies have a greater accumulation of dirt and have to be cleaned more frequently and with equipment that will do the job more thoroughly, such as a wet mop instead of a broom or dust rag. On the other hand, the areas assigned to the maids are larger and have, in addition to floor space and fixtures (including hundreds of seats in auditoriums and large lecture halls), furniture which must be dusted, washed and waxed. Compare, for example, the janitors whose job it is to clean rest-rooms (Mr. Cordero at Butler, who did this work for 11 years (A. 475, 478); Mr. Peralta (who replaced Mr. Richmond) and Mr. Requeijo at Mudd (A. 740, 880-883); and the others listed in the testimony of the night superintendent (A. 1272, 1274, 1278, 1289, 1376-1378, 1345, 1481)) with several of the maids who work in the same buildings. Mr. Cordero cleaned 16 restrooms, ranging in size from one toilet and sink to four toilets and sinks (A. 478); the two janitors at Mudd cleaned 34 restrooms, with two to four (and in one five) toilets in each (A. 882-884). The janitors wet mopped the floors, cleaned the toilets and sinks, and washed marks off the walls and towel racks. They also emptied trash from the restrooms and replenished paper and towels. One of the restroom cleaners from each building also assisted other janitors in pushing the trash trucks to the

waste baskets and trash into a plastic bag which she deposited at the elevator on each floor, cleaned ashtrays, vacuumed, dust mopped floors (which in the case of class rooms required moving the chairs), dusted furniture, polished desks, washed white formica table tops with soap and water, wet mopped the bathroom and stairs, cleaned the toilets and sink, dusted window sills and washed spots off the walls (A. 47-48, 65-66, 68-73, 102, 116-117). Similar areas were assigned to each of the other maids. For example, Mrs. Williams regularly worked two floors in Fayerweather, where she cleaned a large architectural drafting room, a paper or printing room, a classroom and 60 offices, and one floor in an adjacent building (Schermerhorn) where she cleaned numerous offices and a small bathroom (A. 1043-1047, 1049-1054, 1063).

outside pickup area which required from 15 to 30 minutes a day (A. 485, 743, 749, 886). And in a few of the smaller buildings, the restroom cleaners mopped, in addition to the bathroom area, the halls and lobbies.

In contrast, Mrs. Dickens, who worked in Butler along with Mr. Cordero, was regularly responsible for cleaning 60 cubicles in the library (each with two desks, two chairs and a bookcase), eight carpeted offices (each with two to four desks, chairs, etc.), five other rooms (each with tables and machines of some kind), a classroom, a small bathroom (with two toilets and a sink), and the stairs to the mezzanine. In cleaning this area, she emptied

not all (e.g., Mr. Richmond), push trash trucks out to the street. These differences are not sufficient, under "the three-pronged test" summarized in Hodgson v. Brookhaven General Hospital, 436 F.2d 716, 725 (C.A. 5, 1970) (Hodgson v. Behrens Drug, supra, 475 F.2d at 1049), to sustain the trial court's finding of job inequality. They would have to "(1) require extra effort, (2) consume a significant amount of the time of all those whose pay differentials are to be justified in terms of them, and (3) [be] of an economic value commensurate with the pay differential" (ibid.). Applying this test here, wet mopping, which is the primary distinguishing duty, meets neither the first nor third criterion. There is absolutely nothing in the record which would establish that wet mopping requires

These undisputed facts, when viewed in light of Corning Glass and the other cases cited supra, clearly establish that the work of the maids and "restroom" janitors is "equal" for purposes of the statutory standard. Both jobs require: emptying trash, cleaning fixtures fastened to the floor or wall, dusting, cleaning floors (either with a wet mop in the case of the janitors or with a vacuum or dust mop in the case of the maids, who also use a small "toy broom" to clean in corners and to pick up paper clips and other items that the vacuum cleaner missed), and cleaning walls and doors (and, in the case of the maids, furniture, baseboards, radiators and window sills).

The only distinction between the two jobs is that the restroom janitors use a wet mop and some of them, but

greater effort than the cleaning tasks performed by the maids. Columbia finds it significant that a wet mop will pick up two to three pounds of water, while a dry mop picks up only a quarter pound of dirt (A. 1511, 1513-1514), but this minimal kind of weight difference does not warrant a finding of substantial extra effort -- at least not where a maid empties over a hundred waste baskets, dusts baseboards and window sills, and cleans floors in lecture halls and auditoriums where the vacuum cleaner or dust mop has to be maneuvered around large numbers of seats and benches.[12/]

In addition, it is undisputed that the maids regularly wet-mopped corridors, stairways and other areas until 1963 or 1965, when Columbia first began to curtail its cleaning services, and that they were paid the lower rate for this work (A. 40, 56, 503, 506, 541, 543, 625-626, 847-848, 855, 992-994, 1401, 1403-1405, 1432-1434). Although the maids used a 16-ounce mop and a 14-quart pail and wringer (A. 1016, 1026, 1034-1035), in contrast to the janitor's 24-ounce mop and two 44-quart pails and wringers (A. 901-902, 1006-1008, 1308), the maids carried their mops and pails by hand, whereas the janitors transported their larger equipment

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12/ Mopping is a routine task which almost every housewife routinely performs and which does not require any particular skill. Although Columbia's Director of Buildings and Grounds testified that it "sometimes * * * takes us from four to six hours of training to get this [mopping] technique across" (A. 1510), several of the janitors testified that they began work without any training (A. 346-347, Tr. 1402), as did most of the maids (A. 40).

on a wheeled dolly which could be pushed without any difficulty (A. 677-678); significantly, the dolly's total loaded weight of 140 pounds (Opin., A. 19; A. 1006-1008) was only a few pounds heavier than the 111-pound cleaning cart which the maids regularly push from room to room (A. 1429-1430). Of course, the janitors may have to lift the pails (which weigh 44 pounds when filled) to change the water (at least in the older buildings where there are no modern utility sinks) (A. 899-900, 1474-1475), but this is not done with sufficient frequency, nor does it require sufficient additional effort to warrant a finding of unequal work. See in this connection Brennan v. Houston Endowment, supra, where a similar contention concerning the allegedly greater effort involved in wet mopping was made and rejected (21 WH Cases at 562).

The other duty performed by the restroom janitors -- taking out the trash trucks -- is also insufficient under the Brookhaven test, since the trucks are not so heavy that they cannot be pushed by a woman (A. 204, 479-480, 1356)[13/] or, if necessary, by two janitors working together

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13/ Although one of the janitors, John Sampson, testified that "[n]o woman can push [the trash truck]" (A. 364), it is undisputed that all of the women in the 1972 training class could and did (A. 204, 1356). The court's apparent concern for the weight of these trucks when loaded (which is not always 800 pounds but ranges from 300 to 800 pounds (A. 1302, 1356-1357)) ignores the fact that these trucks are on wheels. It is, of course, common knowledge that considerable weights can be pushed rather easily if placed

(Fn. Cont'd. Next Page)

(A. 163, 519, 743, 744, 1356). Moreover, the actual pushing of the truck (as opposed to its loading, which involves lifting the same bags that the maids deposited at the elevators after "pulling" trash) takes only 8 to 20 minutes a day (A. 373, 749, 886, 1460, 1482). In a closely analogous case, also involving maids and janitors, the Tenth Circuit only recently upheld a finding of job equality, stating that:

> The extra effort which janitors may have exerted in running a larger floor cleaning machine than the maids ran, filling a pop machine once a day [which required "15 to 20 minutes"], shoveling some snow and carrying large garbage cans [which required "35-40 minutes twice a day"] is simply too insubstantial to make their jobs unequal [Brennan v. South Davis Community Hospital, ___ F.2d ___ (July 27, 1976), Slip Opin., pp. 9-10].

See also Wirtz v. American Can Company, 288 F.Supp. 14 (W.D. Ark. 1968), where the trial court held that the jobs of men and women machine operators were not equal because the men, but not the women, lifted paper rolls weighing 75 to 115 pounds and transported wheeled "'barns' or wooden boxes approximately 6 feet high by 4 feet wide by 2 feet deep, and weighing 300 pounds empty and up to 1500 pounds when full" (id., at 22). In reversing, the Eighth Circuit ruled that

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__/ Cont'd. on wheeled structures. Indeed, several companies manufacture refrigerators on wheels, which they advertise can be moved by any housewife. (See advertisement in American Bar Association Journal, Vol. 55, Aug. 1969, p. 713.) And a study published by the Women's Bureau, U.S. Dept. of Labor, Lifting and Carrying Weights by Women in Industry, Special Bulletin No. 2, 1946, points out that women performed unskilled manual labor during World War I, and that "[m]uch of this work involved * * * pushing heavy materials" weighing up to "750 pounds."

these lifting and transporting functions did not render the jobs unequal, pointing out that while these duties were "performed regularly," they were "minor and incidental" (requiring from two to seven percent of the male operator's time) and "d[id] not involve the exertion of substantial additional effort" (Shultz v. American Can, supra, 424 F.2d at 360).

These same considerations compel a finding of job equality between the maids and another group of janitors (discussed in our Statement, supra, p. 13) who are assigned either to the same general areas as the maids (A. 332, 336-338, 353, 387-388, 745, 873, 877-878), or to lobbies, corridors, stairways and laboratories (A. 1272-1273, 1277-1279, 1281, 1289, 1481). The primary distinction between the maids and these janitors is, again, that the janitors wet-mop whereas the maids do not. This distinction, however, as we have already demonstrated, does not justify the trial court's finding of greater effort.

In addition, some of the janitors collect bulky trash from the classrooms and offices, but this trash, considering the uniform size and strength of the carts and plastic bags (A. 751), cannot be substantially heavier than the trash collected by the maids -- which includes bottles, books, drafting paper, IBM paper, food, bird waste, etc. (A. 116-117, 272, 412, 413, 429, 1044, 1359) and can weigh up to 50 pounds per bag (A. 116-117).

The janitors may also perform some other special task, such as moving a 55-gallon drum of liquid soap to a wooden skid. The weight of such a drum is not specified in the record, although one janitor estimated that it weighed 200 pounds (A. 768) and the court found that it weighed from 400 to 600 pounds (Opin., A. 19). In any event, it is undisputed that these drums were never lifted but were simply tilted to one side and, after a skid was slipped under the bottom edge, tilted back onto the skid (A. 329-330, 767-769). It is also undisputed that at least two persons (including the women who underwent training in 1972) did the tilting, while a third person maneuvered the skid (A. 165, 198-199, 328-331, 485-486, 767). This drum handling work takes only 5 to 15 minutes (A. 330, 768), and the janitors who appeared at trial testified that they performed this duty, if at all (see A. 460), only infrequently, ranging from once every two or three months, to three times in six years (A. 331, 492-494, 766).

A second occasional duty performed by some, but not all (A. 764), of the janitors was the wet-mopping of large areas which was done with a crew of approximately six janitors. The crew used a large mop tank to transport the water and cleaning solution (A. 374-375, 1298-1299), and, although the court found that the tank weighed from

300 to 540 pounds (Opin., A. 19),[14/] it was on wheels and could be moved without difficulty by two janitors (A. 374-375). This mopping was done in the larger buildings (such as Mudd and SIA); of the six janitors who testified, only Mr. Sampson had used the mop tank, and he had done so on just three occasions (ibid.).

Plainly, these infrequently performed and only marginally different tasks are too "inconsequential" and "minor" under Shultz v. American Can, supra, and the other cases cited, to render the jobs unequal. This is also true with respect to such other claimed duties as polishing marble, hosing sidewalks, shoveling snow and turning on and off ventilation equipment (see Opin., A. 17-18). Although these duties are listed in the job description prepared by Columbia for its janitors, not one of the

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14/ The word mop "tank" was used at trial interchangeably with the word mop "truck" to refer to the regular mopping equipment which, as discussed supra, weighed 140 pounds and was pushed on a wheeled dolly. The only reference to the weight of the "tank" was in the deposition of the Department of Labor's Area Director, Mr. Klainbard, which was admitted into evidence over the Department's objection. Mr. Klainbard had not made any personal investigation of the duties of Columbia's maids and janitors, although he had read the investigation report prepared by one of his subordinates. In response to a question from Columbia's counsel as to whether "janitors at Columbia use[d] mop trucks [weighing] * * * 300 pounds and * * * 540 pounds," he answered: "I am sure some janitors use that equipment" (A. 1098-1099). The compliance officer who conducted the investigation did not know the tank's weight (A. 1118-1119, 1122).

six janitors who testified had ever performed any of these duties and this included Mr. Cordero who had been a janitor at Columbia for 11 years, Mr. Beaton, who had been a janitor for six years, and Mr. Requeijo, who had been a janitor for four years (A. 340, 455, 456, 482, 766, 769-770, 888-889; Pltf's Exh. 125).[15/] Indeed, there was at least some suggestion that the snow shoveling was typically performed by groundsmen (A. 221), although Columbia's Vice President for Business testified that he had observed the janitors performing this function (A. 1136). In any event, it is clear that the snow shoveling and other duties listed above are performed too infrequently and by too few janitors to justify the wage differential.

Columbia also has, as indicated in the Statement, supra, pp. 14-15, a third group of janitors who work in small converted office buildings located immediately off campus (see Pltf's Exh. 101; A. 331-335, 453-456, 461-463,

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15/ As the Fifth Circuit noted in Hodgson v. Brookhaven Hospital, supra, the "controlling factor under the Equal Pay Act is job content" and "the focus" of any judicial determination must be on "the actual duties that the respective employees are called upon to perform" and not on "job descriptions prepared by the employer [which] may or may not fairly describe job content" (436 F.2d at 724).

702-711, 1419).[16/] It is these janitors, we submit, who most clearly demonstrate the trial court's error in concluding that the janitor's job required greater effort since their duties are not only equal, but virtually identical to the duties of the maids. These duties include vacuuming offices and hallways with a standard type vacuum cleaner, dust mopping, dusting, emptying ash trays and wastebaskets, collecting trash in a plastic bag, cleaning small bathrooms and kitchenettes, and, to a limited extent, wet-mopping (A. 453-454, 461-464, 702-708). In apparent recognition of the identical nature of these duties, the trial court emphasized that the off-campus janitors worked "alone at night in * * * buildings located outside the University's security perimeter" (Opin., A. 18-19). This fact, however, does not explain why maids who worked in these very same buildings until Columbia's alleged concern for the maids'

16/ The janitors can, of course, be reassigned from one area to another. In point of fact, however, most janitors "stick with their job" (A. 1346; see also 1269). Thus, both Mr. Cordero and Mr. Requeijo were assigned to restrooms for their entire periods of employment (11 and 4 years, respectively) (A. 475, 880); and Mr. Peralta worked in off-campus buildings for three years (A. 708) while Mr. Garcia had a similar assignment for the full period of his employment (1-2/3 years) (A. 453). There are also janitors in the smaller buildings who perform all of the wet-mopping duties (lobbies, hallways, restrooms, etc.) as well as some of the other tasks discussed supra (A. 1267, 1276-1277, 1287). This does not affect the equality between their work and that of the maids since, as shown above, none of these duties require any significant amount of additional effort.

security led to their reassignment (A. 41-46, 75-77, 384-388, 1037-1039, 1496-1497),[17/] were exerting less effort when they performed the exact same duties as the janitors perform now, or why their work was unequal during the many years that both maids and janitors were assigned to off-campus buildings. Certainly, the fact that the maids were escorted to the buildings (and then left there alone) does not alter the degree of "effort" that they were required to exert to clean these buildings. Nor can there be any serious contention that the absence of any escort for the janitors rendered their working conditions "dissimilar" for purposes of the Act's equal work standard. Columbia, in removing its maids from off-campus buildings, obviously believed that unescorted maids were subject to greater hazards than unescorted janitors. This concern, however laudable, cannot explain the wage disparity maintained between the maids and janitors when they both performed this work, or now, when replacement janitors do the same work that the maids did previously.

The remaining janitors (as discussed supra, pp. 14-15), are assigned to "special project work" (A. 1267-1269, 1272, 1279-1280, 1283, 1289, 1291, 1345), including scrubbing and stripping floors, shampooing rugs, washing venetian blinds, washing walls, etc. Of course, some of this work is also

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17/ The last maid to be reassigned was Mrs. Dickens who was replaced by Alfredo Reyes in January 1974 (A. 1419).

handled by the other janitors on an occasional basis. It is our contention that these duties, whether performed on a regular basis by special project janitors or on an occasional basis by others, do not require any "extra effort" and thus do not meet the first criterion of the "three-pronged test" for job inequality (Hodgson v. Brookhaven General Hospital, supra).

In this connection, Columbia offered no evidence that cleaning venetian blinds or washing walls required greater effort than the other cleaning duties already discussed. The only witness who had ever done this work was Mrs. Moss (during her training period for a janitor's job) and she did not suggest that either task required any unusual effort (A. 203, 212). Mrs. Moss had to use a ladder to remove the blinds, but there is nothing about ladder climbing that requires greater exertion (A. 212). (A ladder was not needed for the wall-washing operation.) Three janitors testifying at the trial (Sampson, Garcia and Requeijo) had never used a ladder for their work (A. 345, 456, 889) and Mr. Requeijo testified that he "ha[d] a phobia against climbing ladders" and would not do it (A. 888-889; cf. Tr. A. 447).

The other major "special project" duties involved the use of floor machines to scrub and strip floors and shampoo carpets. These duties, however, were expressly disregarded by the trial court in making his "finding" of

(ibid.).[18] We would also note, in view of the trial court's reference to the weight and cost of these machines (Opin., A. 19), that they have large transport wheels (A. 909) and require absolutely no maintenance (A. 915).

Plainly, on these facts, and in view of the now settled principles for applying the Act's equal work standard, the trial court committed clear error in holding

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18/ There was testimony from one maid that she had tried a floor machine and that it had "sp[un] [her] around" and that she would not use it again (A. 440). But this maid had not been given any instruction on how to operate the machine. See also the testimony of Sampson, A. 348, 350. Mr. Kenneth Guff, Divisional Sales Manager for the Clarke Floor Machine Company, testified that he had trained a number of men and women to operate the machine and that weight and height are not relevant to one's ability to operate the machine (A. 986-987).

greater effort (Opin., A. 24), first, because a number of the janitors had never used or been trained to use these machines (ibid.; A. 456, 459, 481-482, 486, 773, 778, 791, 886-887, 897) and, secondly, because Columbia paid an additional premium for this work of 25 cents an hour (Opin., A. 24; Pltf's Exh. 104; A. 1169-1170). We would note, however, that the evidence clearly established that the floor machines required no effort to operate, but a "knack," and could, in fact, be operated with one hand (A. 195, 269, 908-909, 911, 913-915, 971, 985-986). According to this same testimony, the only instruction required for operating the machine is a simple demonstration which the average person can master in a matter of minutes

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because of the prevalent belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same" (Corning Glass Works v. Brennan, supra, 417 U.S. at 195; Section 2(a) of the Equal Pay Act, 77 Stat. 56). Unions (and women themselves) were not immune from this belief. Indeed, Congress expressly recognized, in adding Section 6(d)(2), which prohibits labor organizations from causing or attempting to cause an employer to discriminate, that many local union representatives had not been aggressive in seeking to eliminate sex-based discriminatory wage rates. See Hearings Before the House Labor Subcommittee on H.R. 3861 and Related Bills, 88th Cong., 1st Sess., 1963, pp. 60-61 (remarks of

that the jobs of Columbia's maids and janitors were not equal. In part, this error was the result of the trial court having placed too much emphasis on "minor" and "inconsequential" differences in effort, contrary to Shultz v. American Can, supra. In part, too, it reflected a basic misconception of the objectives and purposes of the Equal Pay Act. This is particularly evident from the significance that the trial court placed on the Union's long acquiescence in a wage differential between maids and janitors. Its inference that the Union's acquiescence represented agreement that there were differences in the jobs which merited a differential is patently unwarranted, both as a matter of law and fact.

In the first place, the Equal Pay Act was passed

Rep. Griffin); 108 Cong. Rec. 14751-14752; 109 Cong. Rec. 9198-9199, 9209; 109 Cong. Rec. 2886.[19/]

In the second place, the wage differential was initially established by Columbia unilaterally and the Union simply inherited an already existing dual wage scale (A. 1252-1253).[20/] Thereafter, when new increases were negotiated in collective bargaining the differential remained, since the increases were relatively the same for both sexes. This was consistent with the Union's traditional role of representing all of the employees in collective bargaining (see Senate Hearings, supra, pp. 79-80) and does not in any way warrant the assumption that the Union had made a determination of job inequality.[21/]

Nor can any recognition of job inequality by the Union be inferred from the Union's enforcement of Section 19 of its collective bargaining agreement under which maids are paid the janitor's rate whenever they perform the duties

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19/ Industry representatives unsuccessfully attempted to add to the bill "an exception for a pay differential based on sex that has been negotiated by collective bargaining" (Hearings before the Senate Labor Subcommittee on S.882 and S.910, 88th Cong., 1st Sess., 1963, pp. 140, 149-150; House Hearings, supra, p. 251).

20/ Even the job descriptions were drawn up by Columbia without the Union's participation (A. 1254).

21/ The court's further assumption (Opin., A. 22) that the few women members of the Union's negotiating committee (three out of 21 (Dft's Exh. W)) would have protested the wage differential if they had not agreed with it is even more unrealistic and overlooks not only the male domination of the trade union movement but also the fact that many American women have come to accept the double standard in the compensation of men and women for the same work.

of a janitor,[22/] or the addition of the higher paid "shower maid" classification, which first appeared in the 1949 Contract, "Wage and Hour Schedule, Part-Time Employees" (Pltf's Exh. 112, p. 28), for maids assigned exclusively to restroom cleaning in the women's dormitory with the same duties as janitors assigned to restroom cleaning in other buildings (Tr. 2314). It is the Union's function to insist that the employees receive everything the contract entitles them to, and such insistence does not reflect a determination that the overall contract is equitable as between groups of employees. For example, in Hodgson v. Corning Glass, supra, the women inspectors had also been paid the male rate when they had substituted for men inspectors during World War II. Hodgson v. Corning Glass, supra, 474 F.2d at 229.

In any event, it is not material how the Union looked at the matter. It is the court's function to determine whether jobs are equal for purposes of the Equal Pay Act, and the Union can no more bargain away the employees' statutory rights than the employees could themselves. For this reason, the courts have not hesitated

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22/ Section 19 provides as follows (Pltf's Exh. 104, p. 27):

> An employee temporarily performing the work of another employee in a job classification to which a higher rate of pay is attached shall receive such higher rate for the time during which he performs the work of the employee in the higher classification.

to find a violation of the Act notwithstanding a proven collective bargaining history at least as arguable for the employer's position as that which existed here. See, e.g., Corning Glass, supra, 417 U.S. at 192-194; Shultz v. Wheaton Glass, supra, 421 F.2d at 262; Shultz v. American Can, supra, 424 F.2d at 359. The trial courts in Wheaton and American Can, in finding that the jobs of the men and women were unequal, had likewise relied on the union's acceptance of a dual rate scale and its handling of assignments to the male job.[23/] In reversing these decisions, the courts of appeals recognized, as they have under Title VII, that rights established under the Equal Pay Act are "not rights which can be bargained away -- either by a union, by an employer, or by

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23/ Thus, the trial court in Wheaton stated:

> Rather significantly, there was testimony from which it may be deduced that the status was accepted, i.e., light duty and corresponding wage were acquiesced in by all the parties to the labor agreement. A union representative admitted that he complained to defendant, when a female selector-packer was allegedly assigned to perform duties involving cullet removal, heavy lifting and cleaning around the lehr, protesting that this was work for which she was not employed [Wirtz v. Wheaton Glass Co., 284 F.Supp. 23, 27-28].

And in American Can the trial court found that an agreement between the company and union allowing women to transfer from the lower-paying to the higher-paying job, provided that they demonstrated their ability to perform the "extra duties" of the men's job, "constitutes a formal recognition and acknowledgement by the employees' certified representatives that there is in fact a significant difference in job content between the classifications" (Wirtz v. American Can Company, 288 F.Supp. 14, 17).

both acting in concert." Robinson v. Lorillard Corp., 444 F.2d 791, 799 (C.A. 4, 1971). See, too, Corning Glass, supra; Brooklyn Bank v. O'Neil, 324 U.S. 697, 707 (1945).[24/]

Likewise, there is no pertinent inference to be drawn from the fact that Columbia's maids have not applied for any janitor's job since August 1972. There are simply too many plausible explanations as to why the employees would not ask for reassignment, other than their estimate of relative "effort" required, including, inter alia, routine and habit, inertia, personal preferences for particular favorable aspects of the job in hand, uncertainty about the circumstances of the new positions,[25/] and sensitivity to the unfriendliness, real or imaginary, of supervisors or

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24/ We would also dispute the court's inference that the 1970 wage differential between maids and janitors was implicitly approved by the official of the Federal Mediation Service "who attended the last eight sessions and was instrumental in reaching agreement" (Opin., A. 22). See also A. 1164-1167, 1238-1239. The sole function of this official was to "mediate" disputes between the parties (and there was no issue at that time concerning equal pay) and not to "impose [his] edicts on anybody" (93 Cong. Rec. 4281), or to pass on the merits of the agreement. See National Labor Relations Act, Title II, §201, Act of June 23, 1947, c. 120, 61 Stat. 152, as amended; 29 U.S.C. 171.

25/ Some of the maids may, for example, because of their lack of exposure to floor machines during their training, have doubted their physical ability to handle these machines, although in fact the machines require no strength to operate. See in this connection the testimony of Mrs. Maghee, A. 440; see also A. 677.

less because they are women. This is precisely the practice to which the prohibitions of the Equal Pay Act were addressed. See Corning Glass Works v. Brennan, supra, 417 U.S. at 195.

26/ It was for such personal reasons that Mrs. Moss, one of the seven women made a janitor in August 1972, returned to her former job. According to her testimony, the male supervisor in her new building had embarrassed her with a sexual joke (A. 216-217) and had, in her view, harassed her repeatedly. She had unsuccessfully sought a transfer to another janitor's job in another building. The final straw occurred when she and some maids were cleaning after a school party and the supervisor spilled garbage all over the floor that she had just cleaned (A. 227-228). The trial court's finding that the party was for the maids and that Mrs. Moss was upset because she had to clean up (Opin., A. 30-31) is totally unsubstantiated by anything in the record and contrary to Mrs. Moss's testimony.

fellow employees in traditionally male territory.[26/] The question is not why the women employees did not ask for transfer, but whether they were being paid in accordance with law in the positions that they were holding.

From the undisputed evidence concerning the respective job duties of the maids and janitors, it is clear that they were doing substantially equal work, and that such effort as was from time to time required of the janitors was not of such frequency or magnitude, or so characteristic of the work of one group and so alien to the work of the other, as to justify a substantial across-the-board differential for all work done. The only explanation for the differential is, we submit, the traditional practice of paying women

CERTIFICATE OF SERVICE

I certify that copies of this brief were mailed to Mr. Robert S. Stitt, Thacher, Profitt and Wood, 40 Wall Street, New York, New York 10005, counsel for appellees, on this 24th day of September 1976.

Carin Ann Clauss

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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